

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3837 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA
and
Hon'ble MR.JUSTICE J.R.VORA

- =====
1. Whether Reporters of Local Papers may be allowed : YES
to see the judgement?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : YES
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

GULAMMOHMAD A LAKHADAWALA

Versus

STATE OF GUJARAT

Appearance:

MR RN SHAH for Petitioner

MR UMESH TRIVEDI, Id.AGP for Respondents Nos.1 & 2.

CORAM : MR.JUSTICE M.R.CALLA
and
MR.JUSTICE J.R.VORA

Date of decision: 16/01/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE M.R.CALLA)

This Special Civil Application was filed in this
Court on 9th April 1990 by the occupant on the land
bearing Nondh No.1198 admeasuring 698-54-01 sq.mtrs.
situated at Ward No.8, Surat, for quashing the

notifications issued under Sec.4 and 6 of the Land Acquisition Act and to direct the respondents not to dispossess the petitioner from the lands in question and seeking a declaration that the provisions of Sec.4 and 6 of the Land Acquisition Act are ultra-vires and violative of the provisions of Articles 13, 23, 25 and 26 of the Constitution of India. So far as the challenge to the validity of the provisions of Sec.4 and 6 of the Land Acquisition Act are concerned, the same are not pressed by learned Counsel for the petitioner at the time of arguments. Even otherwise, there is no substance in the challenge to the validity of these provisions.

2. It is given out by Mr.R.N.Shah that initially, one Shri Saiyad Alimuddin Saiyad Mohamad Kadri, Sole Trustee, and Vahivatकर्ता of Bavasidi Kabrastan Trust, at Saiyadpura, Surat was the respondent no.3, but said respondent no.3 expired on 18th Nov.1994. Learned Counsel submits that Civil Application No.2025 of 1995 was filed seeking to substitute the name of said respondent no.3 by new Trustee and such Civil Application was allowed. Mr.Shah submits that the papers of the aforesaid Civil Application No. 2025 of 1995 could not be made available by the Registry.

3. The petitioner came with the case that the land in question bearing Nondh No.1198 admeasuring 698-54-01 situated at Ward No.8, Surat, of the Trust known as Bavasidi Kabrastan Trust is being used for graveyard and there are other monuments and tombs thereon. According to the petitioner, most of the portion was being occupied for the purpose of Kabrastan and the people residing in the said area also used to come for worship as there are some ancestral tombs which are more than 200 years old and that the people have faith in the said tombs and that if the said land is acquired, it will affect their rights guaranteed under Articles 25 and 26 of the Constitution of India. It is also the case of the petitioner that in a small portion of the said land which is not being used for the purpose of tomb, he is occupying the same as tenant by carrying on his business of Charcoal and fire woods and the income from the said shop is the only source of his livelihood for maintaining himself and his family members. It is stated by the petitioner that the land which is used for graveyard belongs to Kabrastan and it is being registered as Public Trust and its registration number is Surat-B-502 and that the petitioner is a beneficiary of the said Trust and also he being a Muslim, the rights guaranteed under Articles 25 and 26 are being infringed upon and therefore, he made a request to the respondent no.2 not to acquire the said

land and to cancel the acquisition proceedings. It has been stated that it was pointed out that Kabrastan and Masjid are one and same on the religious point of view and that the lands belong to their Masjid and Kabrastan and it cannot be acquired and even the Government has laid down the guidelines not to acquire the graveyard or any religious place of any community. It was also pointed out that it is an ancestral property and it is being registered in the office of the Charity Commissioner and it cannot be acquired without serving any notice to the Charity Commissioner and that the land in question cannot be acquired for the purpose of school by the Municipal Corporation as the same being a Kabrastan and as per the guidelines issued by the Government, it is exempted from any acquisition under the provisions of the Land Acquisition Act. It has been stated that in spite of the aforesaid being brought to the notice of the authorities, on account of rivalry in an election between the candidates of different political parties inclusive of Bharatiya Janata Party (BJP) the acquisition has been made. It was also pointed out that there was no need to have a school in the said area as there are more than 10 schools in the said area. It is stated that in spite of the aforesaid facts and without giving personal hearing to the petitioner as provided under Sec.5-A and even without notice under Sec.4(1), the notification under Sec.6 was issued on 24th Nov.1988. That thereupon a representation was made and the petitioner was made to understand that the proceedings will be dropped, but somehow or other, the Municipal Corporation insisted for the said proceedings and the petitioner has no other alternative but to approach the High Court by way of filing the present petition under Article 226 of the Constitution of India. A copy of this notification dated 4th Dec.1987 has been annexed with the petition as Exh.A. It has been stated that without giving any personal hearing to the petitioner, the notification under Sec.6 was issued on 24th Nov.1988. The petitioner then made a representation but the Municipal Corporation did not drop the proceedings and the petitioner had to prefer the present Special Civil Application. The petitioner then states that the notification under Sec.4 was issued on 4th Dec.1987 but the substance thereof was not affixed at conspicuous places in accordance with law, the requirement under Sec.4 was not fulfilled, the proposal to acquire the said land was mala fide as stated above on account of non-voting for the BJP candidate by the residents of the said locality who belonged to Muslim community and that it was only to take revenge on them that the proposal was made for acquiring the said land under the guise of public purpose for constructing

municipal school. It was further stated that no permission had been granted for opening the new school and the residents of the locality were only sought to be harassed, that no opportunity of personal hearing was granted nor the reports submitted by the authority to the respondent no.2 were made available to the petitioner and in fact no hearing was given and without application of mind as to whether the land was in fact required for the public purpose or not, the notification under Sec.6 was also issued. It was then stated that the land which was used as a graveyard had many monuments which were required to be preserved under the provisions of the Monuments Preservation Act, 1904 and under the provisions of the Ancient Monuments and Archeological Sites and Remains Act, 1958. The breach of the provisions of Sec.10 of the Ancient Monuments and Archeological Sites and Remains Act, 1958 was pleaded and it was also stated that the action of the respondents violates the provisions of Article 13 of the Constitution of India and thereby affects the fundamental rights guaranteed under the Constitution of India. It was also pleaded that the Collector had no jurisdiction to declare the land in question to be necessary for the public purpose of constructing a school by acquiring the said land. It was also stated that the acquisition sought by the issuance of the notification under Sec.4 and 6 was colourable exercise of the powers, mala fide and infringes upon the fundamental rights guaranteed under Articles 25 and 26 of the Constitution of India. That it was not open for the respondents to interfere with the petitioner's rights by acquiring the said land in question. The impugned notifications were assailed to be ex-facie illegal and contrary to the provisions of the Act, and violative of Articles 23, 25, and 26 of the Constitution of India. The Municipal Corporation had proposed to acquire certain lands in 1979 also for the purpose of public school and having realised that there was reservation against the acquisition of land bearing No.1076 to 1080 situated at Ambaji Surat Road for the purpose of school, the same was released while the proceedings for acquisition of land in question were not dropped. On these facts, violation of Article 14 of the Constitution of India has been pleaded and that the action of the respondents was discriminatory and was required to be set aside. On these averments, the petition was filed and the direction was sought for quashing and setting aside the notifications issued under Sec.4 and 6 of the Land Acquisition Act and a direction was sought against the respondents not to dispossess the petitioner from the land in question.

4. It appears that this petition had been dismissed

in default, but the same was restored on 29th Jan. 1998 by an order passed by the Division Bench in Misc. Civil Application No.192 of 1998. It appears that initially on 5.4.1991, this matter was ordered to be placed on Board together with Special Civil Application No.2762 of 1990 on 15th April 1991. Thereafter the Rule was issued on 15th April 1991 and the ad-interim relief granted earlier was ordered to continue and the respondents were directed to file their further affidavit latest by Sept.11, 1991. Thereafter on 24.4.1991, as it was noticed that there was no ad-interim relief granted earlier, i.e. prior to 15th April 1991, the order was passed directing the respondents to maintain status-quo as on that date.

5. In this Special Civil Application, no reply has been filed on behalf of the respondents nos.1 and 2. However, Mr.Umesh Trivedi, ld.AGP has submitted that he relies upon the affidavit-in-reply dated 30th July 1990 filed in Special Civil Application No. 2762 of 1990 and the same may be considered for the purpose of this Special Civil Application also because petitioners are different but challenge is the same in Spl.C.A.No.2762/90 it is at the instance of sole trustee and in this case at the instance of a tenant in the same lands. Therefore, the said affidavit-in-reply dated 30th July 1990 filed in Special Civil Application is taken as the reply filed in this Special Civil Application with the consent of the petitioner's counsel. It was pleaded in this affidavit-in-reply that the Trust could not invoke the jurisdiction of this Court under Article 226 of the Constitution of India, that the land in question is not being used for the purpose of graveyard since long and further that the said place was not being used for worship since long; that during the personal visit of the acquiring authority and the Land Acquisition Officer, no tomb or monuments were found this land; on the contrary it was found out that the petitioner had given the said place to other persons on rental basis for commercial purposes, i.e. Gas welding, garage etc. The allegation of surrounding locality being Muslim locality was being denied and it was submitted that the acquiring authority, i.e. Surat Municipal Corporation had sent the proposal for the purpose of acquisition in the year 1982 and at that time the Congress Party was controlling the Municipal Corporation. It has also been denied that the proposal had been sent under the domination of BJP Councillors. It was then pleaded that the petitioner was given full opportunity of filing objections as provided under Sec.5-A and the petitioner's Advocate and other affected persons and their Advocates were also given full opportunity of hearing personally and that it was not

correct to say that the petitioner and other affected persons were not given any personal hearing before the issuance of the notification under Sec.6. The allegation that the substance of the notification under Sec.4 had not been affixed at any conspicuous place in the area and thus the requirement under Sec.4 of the Act was not fulfilled has also been denied. It has been stated that the substance of the notification under Sec. 4 was affixed at the conspicuous place and published on 19th Jan.1988 in presence of two panchas namely, Harifkhan Akhbhar and Jaswantbhai S. Patel. Thus, the requirement of Sec.4 of the Act had been fulfilled by the authority and the notification was not required to be quashed and set aside. It is then stated that the acquiring body and the Land Acquisition Officer had acquired the land in question for public purpose and there was no malafide intention on the part of the authorities and therefore the notification issued under Sec.6 being legal could not be quashed and set aside. The notification under Sec.6 of the Act was issued after giving full opportunity of hearing to the petitioner and other affected parties and after considering the objections filed by them, the notification under Sec.6 could not be said to be malafide or that it was issued without application of mind. The use of the land as graveyard has been denied and the allegation that the graveyard is required to be preserved under the provisions of the Monuments Preservation Act, 1904 and under the provisions of Ancient Monuments and Archeological Sites and Remains Act, 1958 has also been denied. It has also been submitted that there was no tombs and monuments on the land in question and the same is not required to be preserved under the above referred Act. It was pleaded that the authority had not violated any provisions, that the land in question was not a place of protected monuments under the provisions of Sec.10 of the Ancient Monuments Preservation Act, 1904 and it was not a place of worship under Sec.13-A of the Ancient Monuments and Archeological Sites and Remains Act, 1958. While the land in question was not being used for worship since long, there was no question of hurting the religious feeling of the Muslim residents of the area and under the circumstances, the right of worship guaranteed under Articles 25 and 26 of the Constitution of India was not going to be affected. As has been stated in earlier part of this affidavit-in-reply, the land in question was not a monument or a place of worship. The acquisition of the land will not violate the fundamental rights guaranteed under Article 23 of the Constitution of India and thus, the notifications under Sec.4 and 6 were legal.

6. Having heard both the sides, and having gone

through the pleadings as referred to above, we are of the opinion that it is not a case to hold the action of the respondents to be malafide or that the notification had been issued and the decision had been taken to acquire the land in question in colourable exercise of the power. The allegations of malafides have been made, but such oral allegations cannot be considered to make out a case of malafides. The bald plea of malafide has been raised but the allegations are not at all substantiated nor it has been given out as to how there was any political influence so as to precipitate the question of acquisition of the land of the graveyard. The links to make out the case of malafides are totally wanting and on the basis of the bald and vague allegations as have been levelled in this petition, it is not possible for this Court to hold that the action of the respondents is illegal and hence there is no question of holding the State action to be malafide.

7. In fact, a notification No. M.U.N.S. 366 dated 7th Jan.1956 has been produced by Mr.R.N.Shah himself appearing on behalf of the petitioner during the course of arguments and this notification shows that the Kabrasthan on Survey No.1186 and 1198 of Ward No.8 of Surat shall not be used for disposal of the dead from 20th Jan.1956. The contents of this notification No. M.U.N.S. 366 dated 7th Jan.1956 are reproduced as under in order to show that after 1956, the land must not have been used for any public purpose as has been pleaded because as per this notification, the Kabrastan was not to be used for disposal of the dead beyond 20th January 1956:

"NOTIFICATION

No. M.U N S 366.

WHEREAS the Surat Borough Municipality is of opinion that continuation of the use of the Place, known as Bava Sidi Kabrastan, in C.S. No.S. 1186 and 1198 of ward No.8 situated within the Municipal limits of the Surat Municipality, District Surat, for the purpose of the disposal of the dead is likely to become injurious to health of the residents of the surrounding localities. I, therefore, K.L.Panjabi, I.C.S. Director of Local Authorities, Northern Division, in exercise of the powers conferred under Section 185(1) of the Bombay Municipal Boroughs Act, 1925, do hereby direct that the above kabrastan shall not be used for disposal of the dead from twentieth January 1956.

K.L.Panjabi
Director of Local Authorities"
Northern Division.
Shahibagh, Ahmedabad, 4.
7th January, 1956."

8. No illegality whatsoever has been pointed out with regard to Sec.4 and 6 and the notifications issued thereunder. The objections had been filed by the petitioner, the same were taken into consideration and in such matters, it is not necessary that a personal hearing has to be afforded while it has been pleaded by respondents that even the advocates had been personally heard. Learned Counsel for the petitioner could not point out any illegality so as to warrant interference by this Court with the proceedings of acquisition. The argument that this land being a small piece of land could not be made use of for the purpose of establishing a public school and that there were already existing ten schools in the area is highly a ground for us to interfere under Article 226 of the Constitution of India because it is given out by Mr.Umesh Trivedi, Id.AGP that all these ten schools are private schools and there was no school of the Municipal Corporation in the said area and as such the land has already been acquired and the award has already been declared and that the amount has already been deposited by the acquiring body, i.e. the Municipal Corporation of Surat with the Government. Thus the entire proceedings are over, but only the possession could not be taken because there was an interim order passed by this Court. However, it is still be open for the petitioner to approach the Municipal Corporation of Surat and the State Government if it can be considered by them that now, after so many years, it is not necessary to establish this public school. In any view of the matter, this Court does not find any case for interference. If any such representation is made by the petitioner before the Municipal Corporation of Surat or the State Government, they are free to take any decision as they may deem fit in accordance with law.

9. In the facts and circumstances of this case, we do not find any merit in this Special Civil Application. The same is hereby rejected. The Rule is hereby discharged. The interim order dated 24.4.1991 stands vacated. No order as to costs.

(M.R. Calla, J.)

(J.R. Vora, J.)
Sreeram.